

(1) Claimant's injury of November 12, 1992 caused temporary aggravation of claimant's pre-existing injury but resulted in no additional permanent disability.

Claimant injured herself on November 12, 1992 when she was attempting to move a television on a cart and twisted her back. Claimant continued working until November 16. By then pain had become severe and she reported the injury to her vice-principal and school nurse. Respondent referred her for treatment at the Wichita Clinic. The claimant was taken off work for three (3) weeks and then returned to work. She was subsequently sent to Dr. Stephen Sparks and then later referred to Dr. Paul Stein. Dr. Sparks recommended physical therapy, which she underwent from approximately November 1992 until sometime in January 1993.

Claimant had an earlier back injury in October of 1990. While on a field trip the bus in which she was riding was struck by a motor vehicle. For this injury claimant received workers compensation benefits and also filed a third party action against the driver of the other vehicle.

The dispute here concerns whether the injury of November 12, 1992, while moving a cart with a television and VCR, caused additional permanent impairment or temporary aggravation only. Three (3) physicians testified on this point. Ernest R. Schlachter, M.D., who is the only one (1) of the three (3) physicians who saw claimant both before and after her first low back injury in 1992, testified that in his opinion the 1992 injury caused additional permanent impairment. He had rated the claimant's impairment at twenty percent (20%) of the body as a whole following the 1990 injury and concluded that after the 1992 injury her impairment was now twenty-five percent (25%) of the body as whole.

On the other hand, the treating physician, Dr. Sparks, testified that in his opinion the 1992 injury caused a temporary aggravation and exacerbation but no additional permanent impairment. Because of the disparity in opinions by Dr. Schlachter and Dr. Sparks, the Administrative Law Judge referred claimant to Dr. Lawrence Blaty for an independent medical evaluation. On the key question he concurred with Dr. Sparks. He agreed the 1992 injury caused no additional permanent impairment.

The Administrative Law Judge adopted the opinion given by the independent medical examiner, Dr. Blaty, and the Appeals Board agrees. Claimant emphasizes low back spasms which Dr. Schlachter found to exist after the 1992 injury and not the 1990. Claimant also emphasizes the fact that claimant's 1990 injury produced pain down her left leg, while the current injury produced pain down the right leg. Neither fact convinces the Appeals Board claimant has additional permanent injury. The MRI taken following the 1990 injury showed a mid-line bulge. Both Dr. Sparks and Dr. Blaty found the change in location of the leg pain immaterial to the central question of additional permanent impairment. Neither Dr. Blaty or Dr. Sparks found, at the time of their exams, the muscle spasms referred to by Dr. Schlachter. For these reasons the Appeals Board finds the opinion expressed by Dr. Sparks and Dr. Blaty to be more convincing and concluded that the injury of November 12, 1992 resulted in temporary aggravation, but no additional permanent impairment.

(2) The finding that claimant's injury is a temporary aggravation only renders moot the issue relating to credit under K.S.A. 44-510a.

(3) The Appeals Board finds the Kansas Workers Compensation Fund should be responsible for all of the benefits awarded for claimant's temporary condition, including three (3) weeks of temporary total disability benefits, the authorized medical and unauthorized up to the statutory limit.

To shift liability to the Kansas Workers Compensation Fund the respondent must establish: (1) The respondent had knowledge of claimant's pre-existing impairment which is a handicap; and (2) that the pre-existing handicap caused or contributed to the disability resulting from the second accident. K.S.A. 1992 Supp. 44-567.

Respondent clearly had knowledge of claimant's pre-existing injury and impairment. As previously indicated, claimant filed a claim and recovered workers compensation benefits. The record also reflects that respondent filed a Form 88 which entitles respondent to a presumption that it had knowledge of the handicap. See K.S.A. 1992 Supp. 44-567. Although the Workers Compensation Fund attorney raised questions whether the Form 88 was properly admitted into evidence, it appears respondent listed the introduction of the Form 88 as among the stipulations at the time he submitted the case for decision by the Administrative Law Judge. The Fund also does not dispute the stipulation and did not object at the time of submission of the claim. Under the circumstances, the Appeals Board finds the Form 88 to be part of the evidentiary record to be considered. Even without the Form 88, the evidence establishes knowledge of the impairment.

The Appeals Board also finds that the injury of November 12, 1992 probably or most likely would not have occurred but for the pre-existing impairment. Of the three (3) physicians who testified, only Dr. Schlachter directly expresses his opinion that the 1992 injury probably or most likely would not have occurred but for the pre-existing impairment. However, both Dr. Blaty and Dr. Sparks describe the 1992 injury as an exacerbation of the previous impairment. These combined opinions together with the description of an injury involving relatively minor trauma convince the Appeals Board that respondent has met its burden to establish that the 1992 injury probably or most likely would not have occurred but for the pre-existing impairment. Accordingly, one hundred percent (100%) of the benefits awarded are assessed against the Workers Compensation Fund.

AWARD

WHEREFORE, the Appeals Board finds that the Award entered by Administrative Law Judge John D. Clark dated March 10, 1995 should be affirmed in part and reversed in part. The Appeals Board affirms the finding that the injury resulted in temporary aggravation only with no permanent impairment. The Appeals Board reverses the finding relating the liability of the Workers Compensation Fund and assesses one hundred percent (100%) of the benefits awarded to be paid by the Workers Compensation Fund.

IT IS SO ORDERED.

Dated this ____ day of September 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, KS
Robert G. Martin II, Wichita, KS
Scott J. Mann, Hutchinson, KS
John D. Clark, Administrative Law Judge
Philip Harness, Director